IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	
	:	
v.	:	05-CR–273
	:	
ALEXIS RAMIREZ,	:	
	:	
Defendant	:	

MEMORANDUM

Anita B. Brody, J. **December 20 , 2005**

The issue before me is whether a prior New York conviction for second-degree possession of two or more ounces of heroin qualifies as a "drug trafficking offense" that would require a 16-level upward adjustment under United States Sentencing Guidelines § 2L1.2(b)(1).

I. BACKGROUND

On November 30, 2000, while living in New York, the defendant Alexis Ramirez was convicted of second-degree possession of two or more ounces of heroin in violation of New York Penal Law § 220.18, and was sentenced to six years to life imprisonment. The indictment charged him with having "knowingly and unlawfully possessed one or more preparations, compounds, mixtures and substances, containing a narcotic drug, to wit, heroin, and said preparations, compounds, mixtures and substances are of an aggregated weight of two ounces or

more."[1] (Gov. Mem. Ex. A.) Ramirez is a citizen of the Dominican Republic and was deported on November 17, 2004.

On February 19, 2005, Ramirez was detained after illegally attempting to enter the United States at the Philadelphia International Airport. On June 6, 2005, Ramirez pleaded guilty to a one count indictment charging him with illegally entering the United States after deportation by an aggravated felon, in violation of 8 U.S.C. §§ 1326(a) and (b)(2).

II. DISCUSSION

Unlawfully entering or remaining in the United States, a violation of 8 U.S.C. § 1326(a), has a base offense level of 8. U.S.S.G. § 2L1.2(a). United States Sentencing Guidelines § 2L1.2(b)(1)(A) provides for a 16-level adjustment if the defendant was previously deported after a felony conviction of "a drug trafficking offense for which the sentence imposed exceeded thirteen months." Application Note 1(B)(iv) in the Commentary to § 2L1.2 defines "drug trafficking offense" as:

> an offense under federal, state or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute or dispense.

Id. The Government concedes that Ramirez's conviction on its face does not satisfy any of the categories referred to in the Commentary. Instead, the Government argues that the structure of the New York statutory scheme for criminal possession of heroin shows that the state considers second-degree possession to be a drug trafficking crime warranting the 16-level upward

[1]The indictment also charged Ramirez with violating New York Penal Law § 220.21(1), first-degree possession, but he only pled guilty to second-degree possession.

adjustment under the Guidelines.[2]

Second-degree possession, the offense Ramirez was convicted of, is a Class A-II felony. N.Y. Penal Law § 220.18. At the time Ramirez was convicted, the second-degree possession statute read[3]:

> A person is guilty of criminal possession of a controlled substance in the second-degree when he or she knowingly and unlawfully possesses:
> 1. one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures or substances are of an aggregate weight of two ounces or more...

Id. As noted, neither the second-degree statute nor the first-degree statute contains an element of intent to sell. The Government asks that I read intent, and thus "drug trafficking," into the second-degree offense.

I first turn to the New York state courts for guidance on whether intent to sell is implied in the statute. Unlike the federal courts, New York courts will hold "apparently inconsistent verdicts...repugnant when the crimes upon which the verdicts are returned are either identical as to each of their elements or so related that an acquittal on one negatives an essential element of the crimes upon which there was conviction." People v. Dercole, 72 A.D.2d 318, 333 (N.Y.

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[2]The Government summarizes the New York drug statutes as follows:

Statute	Degree	Crime	Class of Felony
220.21	1st	Possession of 4 oz. or more	A-I
220.18	2nd	Possession of 2 oz. or more	A-II
220.16	3rd	Possession of any amount with intent to sell	B
220.09	4th	Possession of 1/8 oz. or more	C
220.06	5th	Possession of 500 mg. or more	D

[3]Subdivision 1 of the statute was amended in 2004 by substituting "four" for "two" ounces. L. 2004, c. 738, § 21.

1980). Under New York law, if a verdict is repugnant, it must be overturned. Id. at 319. In People v. Padilla, 132 A.D.2d 578 (2d Dept. 1987), the defendant was convicted of first-degree possession of a controlled substance. As noted above, first-degree possession is based entirely on unlawful possession of a minimum amount of a controlled substance.[4] See N.Y. Penal Law § 220.21. At the same time, the defendant was acquitted of a third-degree possession charge requiring intent. The New York Appellate Division found no repugnancy in these verdicts. The court explained that in light of the jury charge, the jury could have found the defendant guilty of first-degree possession, "an essential element of which is possession of cocaine weighing an aggregate of four ounces or more" and not guilty of third-degree possession, "an essential element of which is the possession of the substance with the intent to sell." Id. at 579. In order for the court to find no repugnancy, it had to decide that intent to deliver was not an element of first-degree possession.

Again in People v. Motz, 256 A.D.2d 46 (1st Dept. 1998), the Appellate Division found no repugnancy in a defendant's simultaneous acquittal on third-degree possession with intent to sell and conviction on second-degree possession. If every conviction for second-degree possession meant possession with intent to sell, such divergent verdicts would be illegal in New York. Repugnancy did not apply in Motz because the two degrees of possession are distinct crimes with different elements. Therefore the intent language from third-degree possession may not be automatically imported into the second-degree crime.

Two recent federal cases discuss whether a state drug conviction constitutes a "drug

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[4]As is second-degree possession, the only difference between the two being the minimum amount of drugs required and the class of the felony.

trafficking offense" for purposes of the 16-level sentencing adjustment. The fact situation in United States v. Herrera-Roldan, 4134 F.3d 1238 (10th Cir. 2005), is closely related to this case. The defendant in Herrera-Roldan, as is Ramirez, was being sentenced for a violation of 8 U.S.C. §§ 1326(a) and (b)(2). He had previously been convicted under a Texas statute entitled "Offense: Possession of Marihuana." Texas Health & Safety Code § 481.121. The statute provided in relevant part:

> (a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.
> (b) An offense under Subsection (a) is:
> .....
> (5) a felony of the second-degree if the amount of marihuana possessed is 2,000 pounds or less but more than 50 pounds...

Id. § 481.121(b)(5). Because the Texas statute prohibited mere possession, the court found that the defendant's conviction did not count as a drug trafficking offense under United States Sentencing Guidelines § 2L1.2(b)(1)(B). Under the scheme of the statute, possession of this large amount of marijuana is punished more severely than delivery of a lesser amount.[5] The Government in Herrera-Roldan argued that the sheer amount of drugs involved made it a drug

[5]This chart compares the Texas penalties for delivery and possession of marijuana:

Level of offense	VTCA § 481.120: Delivery of Marihuana	VTCA § 481.121: Possession of Marihuana
Class B misdemeanor	1/4 oz. or less w/out remuneration	2 oz or less
Class A misdemeanor	1/4 oz. or less with remuneration	between 2 oz. and 4 oz.
state jail felony	between 1/4 oz. and 5 lb.	between 4 oz. and 5 lb.
3rd degree felony	n/a	between 5 lb. and 50 lb.
2nd-degree felony	between 5 lb. and 50 lb.	between 50 lb. and 2000 lb.
1st-degree felony	between 50 lb. and 2000 lb.	n/a
10 years to life in prison	more than 2000 lb.	more than 2000 lb.

trafficking crime. Id. at 1242. The Government urged, as it does in the instant case, that the state statutory scheme implied an intent to distribute from the fact of possession. Id. at 1242-43.

The Tenth Circuit found that the Texas conviction did not merit a 16-level adjustment because the Texas statute did not lump together manufacture, delivery, and possession with or without intent to distribute drugs. Instead, in separate statutes, Texas "gradually increases punishment for *both* possession and delivery based on the quantity of drug," and "there is no designated quantity of drugs at which possession is treated the same as delivery and subjected to more severe punishment." Id. Most importantly, the court held that because the Guidelines focus "not on the defendant's conduct, but on what the state law prohibits," the court should not "draw inferences about an intent to distribute from Mr. Herrera's underlying conduct." Id. at 1241.

The other decision, the one upon which the Government relies, is United States v. Madera-Madera, 333 F.3d 1228 (11th Cir. 2003). The court in Madera-Madera, however, imposed the 16-level adjustment for a "drug trafficking offense" based on a conviction under a significantly different state statute. In Madera-Madera, the Eleventh Circuit held that a guilty plea to possession of 28 grams or more of methamphetamine under Georgia law was a drug trafficking offense qualifying for a 16-level enhancement, based on the structure of the Georgia drug laws. Id. at 1232. The defendant in Madera-Madera had been convicted under a Georgia statute entitled "Sale, maufacture, etc., of certain controlled substances." O.C.G.A. § 16-13-31. The specific subsection that the defendant violated stated that

> (e) Any person who knowingly sells, delivers, or brings into this state or has possession of 28 grams or more of methamphetamine, amphetamine, or any mixture containing either methamphetamine or amphetamine, as described in Schedule II, in violation of this article

commits the felony **offense of trafficking** in methamphetamine or amphetamine...

Id. § 16-13-31(e) (emphasis added).

The Eleventh Circuit found that the defendant's conviction under §16-13-31 was for a drug trafficking crime by operation of law, because

> [b]y selecting 28 grams as the dividing line between possession/possession with intent to distribute versus trafficking, the three-tiered Georgia drug classification system recognizes that someone who is in possession of 87 grams of methamphetamine...plans on distributing and thereby 'trafficking' those drugs.[6]

Id. at 1232. Based on the judgment of Georgia's legislature, as embodied in the language of the statute, the court held that a drug trafficking conviction need not require proof of intent to distribute. Id. at 1233.

The Government's argument that Madera-Madera is directly on point for this case is incorrect. The New York legislature has made no such explicit statutory determination of when possession of a given quantity of a controlled substance is a drug trafficking offense per se. On the other hand, Herrera-Roldan is persuasive. Unlike Georgia, Texas and New York do not merge sale, possession, and possession with intent to sell quantities above a certain minimum amount into the same crime. Both Texas and New York treat possession and sale at all amounts

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[6] This chart of Georgia's law on methamphetamine shows how the state chose to merge possessory and trafficking crimes over 28 grams into a single "trafficking" statute:

Statute	Crime	Amount	Penalty
§16-13-30(a)	purchase, possess, control	any amount	2-15 years
§16-13-30(b)	manufacture, deliver, distribute dispense, administer, sell, or possess with intent to distribute	any amount	5-30 years
§16-13-31	sell, deliver, bring into the state or possess - defined as "the felony offense of trafficking"	28 grams or more	minimum of 10 years and $200,000 fine

differently, in different statutes.[7] Similar to the Texas laws on possession and delivery of marijuana, New York has parallel statutes for possession and sale of heroin, with sale - obviously a trafficking offense - treated more seriously than possession of equivalent amounts.[8] In contrast, Georgia has only one methamphetamine statute above 28 grams, which does not distinguish between selling and possessing, and calls both "trafficking." Because the New York statutory scheme is thus functionally dissimilar from Georgia's, Madera-Madera has limited relevance to this case. As the Tenth Circuit found in Herrera-Roldan, without statutory or factual support, I cannot find that Ramirez committed a drug trafficking crime.

This approach is also suggested by the reasoning in Shepard v. United States, 125 S. Ct. 1254 (2005). The Court in Shepard dictated in another context how federal courts must determine whether predicate convictions satisfy the Sentencing Guidelines. The Court held that a sentencing court's inquiry into whether a state conviction for burglary supports an enhancement

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[7]For example, Texas considers possession of 50 to 2000 pounds of marijuana to be a second-degree felony, while delivery of the same amount would be a first-degree felony. See Texas Health & Safety Code §§ 481.121(b)(5), 481.120(b)(5). In the present case, Ramirez pled guilty to second-degree unlawful possession of two ounces or more of heroin, a class A-II felony under § 220.18. If he had pled guilty to *selling*, i.e. trafficking, the same amount, he would have committed *first*-degree criminal sale of a controlled substance, a more serious A-I felony under a different statute, New York Penal Law § 220.43.

[8] This chart compares the sale and possession amounts of heroin that constitute each level of felony in New York:

Level of Offense	Sale Amount	Possession Amount
D felony	n/a	500 mg (§220.06)
C felony	n/a	1/8 oz (§220.09)
B felony	any amount (§220.39)	1/2 oz (§220.16)
A-II felony	1/2 oz. (§220.41)	2 oz (§220.18)
A-I felony	2 oz. (§220.43)	4 oz. (§220.21)

under the Armed Career Criminal Act ("ACCA")

> is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.

Id. at 1257. In the present case, the record before me is limited to New York's statutory definition and the indictment of Ramirez, neither of which mention drug trafficking or intent to sell drugs. Shepard held that the sentencing court cannot even look to police reports in deciding whether the elements of burglary for the purposes of the ACCA are satisfied, because such an inquiry would require independent factual determinations. Id. If I cannot consider facts relating to the conviction beyond the documents listed in Shepard, *a fortiori* I should not make independent judgments about what amount of drugs is inherently a trafficking amount, or whether a New York statute that penalizes only possession of drugs is categorically aimed at drug trafficking offenses.

The Government's reliance on Shepard's predecessor, United States v. Taylor, 495 U.S. 575 (1990), is misplaced. In Taylor, the Court reasoned that the elements of a state burglary conviction are the relevant consideration for sentencing enhancements under the federal statute prohibiting possession of a firearm by a convicted felon. The Court said that it seemed "implausible that Congress intended the meaning of 'burglary' for purposes of § 924(e) to depend on the definition adopted by the State of conviction." Id. at 590. Instead, the Court held, courts should rely on a uniform definition of burglary for sentencing under the federal statute, "independent of the labels employed by various states' criminal codes." Id. at 592. The Court decided that common-law burglary should be that definition. Drug trafficking crimes, unlike burglary, do not lend themselves to such easy standardization, because they are not rooted in the

common law as burglary is. The Commentary to § 2L1.2 defines drug trafficking crimes by reference to federal, state, and local statutes, and because state laws vary considerably, there is no one standard for what is a state drug trafficking offense.[9] Therefore Taylor does not resolve this case, because even following its instruction to look at the elements of a state-defined crime, rather than the title, second-degree possession in New York gives no indication that it is a trafficking crime. Intent to sell is simply not an element of the statute under which Ramirez was convicted.

III. CONCLUSION

In short, Shepard prevents independent judicial fact-finding on whether Ramirez's prior conviction satisfies the requirements of United States Sentencing Guidelines § 2L1.2(b)(1)(A), and limits the documents I may consider to answer that question. The United States Sentencing Commission did not state that possession of a specified amount of drugs constitutes a drug trafficking offense for purposes of the 16-level enhancement; the New York statute that Ramirez was convicted of violating does not have an element of sale or intent to sell; and the New York state indictment of Ramirez charges only knowing possession. I cannot ascertain the intent of the New York State Legislature where the statute is silent, and I cannot make an independent factual finding that a specific quantity of drugs is *per se* a trafficking amount. Therefore, I do not find Ramirez's prior conviction to be a drug trafficking offense meriting a 16-level enhancement

[9]The Government is not arguing in this case that state convictions should be judged under federal drug law standards. If they did, intent to distribute would be a necessary element of a state drug trafficking conviction, and Ramirez's conviction would not qualify for an enhancement.

under the Guidelines.

S/Anita B. Brody

ANITA B. BRODY, J.

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